Supreme Court, U. S.
FILED
JUL 16 1974
MICHAEL RODAK, JR., CLERK

No. 73-2068

In the Supreme Court of the United States

OCTOBER TERM, 1974

ANGELO BARTEMIO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Angelo Bartemio, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on May 30, 1974 affirming the judgment of conviction previously entered in the United States District Court for the Northern District of Illinois, Eastern Division. Petition for rehearing in banc was denied June 28, 1974.

OPINION BELOW

The judgment of the District Court is not reported. The order of the United States Court of Appeals for the Seventh Circuit has not been officially reported. It is repro-

duced as Appendix A to this Petition. Additional Appendices to this Petition are the indictment in this case, the order denying rehearing in banc and a note from the Jury to the Trial judge.

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of conviction and sentence of the District Court was entered on May 30, 1974 (App. A). The petition for rehearing in banc was denied on June 28, 1974 (App. A). The jurisdiction of this court is invoked pursuant to the provisions of Title 28, United States Code, 1254(1).

QUESTIONS PRESENTED

(1) Whether prosecutorial misconduct in both suppressing evidence favorable to the defendant, Bartemio, and in weaving a closing argument interlaced with the personal opinions of the government prosecutor considered together, denied Bartemio a fair trial?

(2) Was Bartemio denied his Sixth Amendment right of the "Nature and cause of the accusation against him" by being compelled to stand trial on a duplicitous indictment?

(A) Where one count of an indictment charges more than one offense is it duplicitous as a matter of law and therefore void?

(B) What is the effect of incorporating by reference as per Rule 7(c) of the Fed.R.Crim.Proc. when the substantive count of a two count indictment is incorporated by reference into the conspiracy count and considered there as an overt act?

(C) Whether Bartemio's acquittal on the conspiracy count which incorporated the "aiding and abetting into the conspiracy" requires a reversal of the conviction where before, during and post-trial Bartemio moved to dismiss Count two as being duplicitous?

(D) Whether Bartemio's acquittal on the overall conspiracy offense which had incorporated the aiding and abetting as an overt act requires a new trial where almost all of the trial testimony was admitted under the conspiracy-hearsay exception Rule?

(3) Whether Bartemio can be convicted of aiding and abetting the possession of stolen bonds where the theft occurred long prior to his entering the case contrary to the opinion of this court in *Bollenbach* v. *U.S.*, 326 U.S. 607, 67 S.Ct. 402 (1946)?

(4) Whether the affirmation of a conviction may stand where the Court of Appeals makes findings of fact in sustaining the conviction which are "clearly erroneous".

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States provides:

> "No person . . . shall be deprived of life, liberty or property, without due process of law . . ."

The Sixth Amendment to the Constitution of the United States provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . and to be informed of the nature and the cause of accusation; to be confronted with witnesses against him. . . ."

STATEMENT OF THE CASE

During the month of August, 1971 Barbara Quattrochi was engaged in actively attempting to sell certain United States Savings Bonds and "Oklahoma City Bearer Bonds". Most of her activities involved herself, an informer "Lucky" and an undercover agent employed by the Secret Service of the United States. On August 27, 1971 Quattrochi, Drain and Brennan[1] were arrested at the O'Hare Inn in Chicago, Illinois while attempting to negotiate the sale of 189 Oklahoma City bearer bonds which had been stolen from interstate commerce some time in December of 1970. Bartemio was not arrested until January, 1972 when an indictment had been returned.[2]

At trial Bartemio testified that he was in the Chicago Area for 2 or 3 weeks following the arrest of Quattrochi and the others (Tr. 668, 669). That he left the Chicago area and returned to his home in Florida and returned to work (Tr. 669, 670).

Barbara Quattrochi the titular head of this alleged conspiracy pled guilty on May 25, 1972 to both counts of the

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[1] Barbara Quattrochi pled guilty to the charges in the instant indictment on May 25, 1972; between that date and August 1, 1972 she wrote a fifteen (15) page "statement" regarding the entire scenerio of events which led to her arrest and conviction. This statement, as later facts unfold, becomes crucial. This statement was not shown to defense counsel until on or about June 5, 1974. On August 1, 1972 Quattrochi pled guilty and received a three (3) year prison sentence. Messrs. Drain and Brennan were found guilty of both counts of the indictment and received prison sentences.

[2] The original indictment, 72 CR 31 was returned in January, 1972. As relates to Bartemio it stated "Bartemio did counsel, command, induce and procure"; on the Government's Motion this indictment was dismissed on May 25, 1972 and indictment 72 CR 397 was filed (App. B). As to Bartemio the only difference is that the language of Count 2 was changed from "did counsel, command, induce and procure" to "aid and abet."

indictment; she was sentenced on August 1, 1972 to three years in custody and five years consecutive probation to follow thereafter. Messrs. Brennan and Drain stood trial along with Bartemio commencing April 23, 1973. Prior to trial Bartemio sought by pre-trial motion to dismiss portions of the indictment in that they were inconsistent. This motion related to the conspiracy and the aiding and abetting as charged in Count 2 (App. B). All motions relating to the indictment were denied. They were renewed at the close of the Government's case, at the close of all the evidence and in post-trial motions.

During the trial the prosecutorial misconduct as alleged in the issues presented to this court were that the government suppressed evidence favorable to Bartemio. The particular item which is the subject matter of this issue was a pre-sentence investigation report under the pen of Barbara Quattrochi, the guilty pleading non-testifying co-conspirator. She had written a fifteen (15) page report to the Probation Department prior to her sentencing. The Government had the whole statement in their possession.[3] The Government gave all defense counsel three (3) pages of this document and those three (3) pages were used as a handwriting exemplar in order to establish that certain notes in her possession at the time of her arrest were in her handwriting. Unfortunately, the balance of this statement while always in the hands of the government prosecutor, was never tendered or showed to defense counsel. Post-appeal the United States Attorney exhibited the entire fifteen (15) page statement to defense counsel. The last two (2) pages of this particular document state, in substance, that Barbara Quattrochi, "alone", set-up

[3] Petitioner urges this court to inquire under what circumstances the U.S. Attorney gathered possession of this handwritten statement given only to the probation department as part of her pre-sentence investigation, c.f., Rule 32(c) (1)(2) of the Fed.R.Crim. Proc.

and participated in the venture which is the subject matter of her sentence and the indictment. Again, not by way of repetition, but rather by way of emphasis, this entire document was always in the hands of the Government prosecutor but, suppressed.

Constitutional error[4] is assigned not only as to the suppression of this evidence but also as it relates to the indictment and to the closing argument by the United States Attorney.

The closing argument by the United States Attorney is set forth as follows:

(1) "Now, I think, ladies and gentlemen, that the facts and circumstances that you know later on in the case that Mrs. Quattrochi and Bartemio were visiting the source at that time as they were observed." (Tr. 750)

(2) "I think that has some significance in this case, that he was introduced as Frankie. I think the significance is that there was no need for Dal Porto to know the other conspirators, that Barbara Quattrochi had no need to have Dal Porto know about the defendant, Bartemio. But you are free to reason a logical inference of what you think that meant, but I think that it meant that he was trying to hide or keep Bartemio a secret from Dal Porto". (Tr. 751, 752)

(3) "Ladies and gentlemen, a crucial conversation took place there which I think the evidence shows places Bartemio as an important co-conspirator in this case.

Mr. Ackerman: Your Honor, the defendant will object to the personal opinion of the prosecutor." (Tr. 755, 756)

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[4] This error would relate to both 5th and 6th Amendment errors; 5th being a violation of due process; 6th being the inability to confront witnesses against Bartemio, i.e. the U.S. Attorney making the statement to the jury.

(4) "Mr. Lord: On the date that the defendant, Bartemio, had a conversation with Maurice Harte, wherein Buddy, as Harte knew Bartemio, told him that Oklahoma City bearer bonds were available. These Oklahoma bearer bonds, I submit to you.

Going further to the credibility of Mr. Harte's testimony about the conversation, Buddy Bartemio told Harte that he had another deal pending, and I think the evidence shows that that 'other deal pending' was with Agent Dal Porto.

Mr. Ackerman: Same objection, if the Court please." (Tr. 756)

(5) "Mr. Lord: I think the evidence does show at this point that Mr. Bartemio wanted to get 15 percent from Mr. Harte, because he had already arranged for a 12 percent purchase of these bonds.

Ladies and gentlemen, I think that lends credibility. I think the evidence shows that—

Mr. Ackerman: Your Honor, may I just make a standing objection then?

The Court: All right. Mr. Lord—

Mr. Lord: I'm sorry." (Tr. 755, 756)

After the trial judge admonished the Government prosecutor to refrain from thus continuing to "personally argue to the jury", the prosecutor continued:

(6) "But I think that there has been no showing that Maurice Harte was not telling the truth about those conversations that he had with Angelo Bartemio regarding Oklahoma City bonds.

Ladies and Gentlemen, the climax of this case occurred on August 27, 1971, for on that date the deal, the negotiation and sale of these stolen bearer securities was to be consummated, and on that date about 4:00 p.m. Special Agent Sheridan testified that he was present at the Barbara Quattrochi residence, and he observed again the defendant, Bartemio, at that location.

• • •

The evidence is clear that Mr. Bartemio made surveillances in the area. There was a good reason for that: Mrs. Quattrochi was about to sell $945,000 in stolen bearer securities. She wanted some protection, surveillance protection for that, and the defendant, Bartemio, provided it at that time.

Defendant Bartemio offered explanations which I do not find logical—

Mr. Ackerman: Objection, if the Court please.

Mr. Lord: —which I do not think you should find logical—

Mr. Ackerman: Same objection.

The Court: All right. Mr. Lord is expressing his personal opinion, so refrain from doing so, Mr. Lord. I am sure you do not intend to express your personal opinion.

Mr. Lord: Sorry, your Honor." (Tr. 758).

(7) ". . . But, I think the evidence shows, is the defendant, Buddy Bartemio, and the share he was to receive." (Tr. 761)."

The indictment (App. B) shows that Bartemio and others are alleged to have been a part of a conspiracy to both possess and distribute 189 Oklahoma City Bearer Bonds stolen from interstate commerce. The conspiracy count of the indictment "incorporates by reference" Count 2 into Count 1. Count 2, of course, charges Bartemio simply with "aiding, abetting" the unlawful possession of these bearer bonds on August 27, 1971.

The jury acquitted Bartemio of the conspiracy which had "incorporated by reference" the aiding and abetting. During their deliberation the jury requested they have an opportunity to read the pre-sentence investigation of Barbara Quattrochi (R. 52). This court's answer is reproduced as Appendix C in this petition.

On June 12, 1973 Bartemio was sentenced to five (5) years in custody for the conviction of Count 2 of the indictment (R. 66).

REASONS FOR GRANTING WRIT

The threshold questions raised in this petition relate to substantial government misconduct. Prior to trial the government had a fifteen (15) page statement written by a guilty pleading defendant, Barbara Quattrochi. She "personally" testified not at Bartemio's trial. Her "conspiratorial" statements to a Government informer and Secret Service Agent were admitted "in toto" over objection. Her handwritten statement contained evidence favorable to Bartemio. The government, of course, was well aware of this. The first three (3) pages of this statement were given to Defense counsel because they comprised the basis for a handwriting exemplar which led to the admission of a government exhibit (Gv.8) which bore the nickname of Bartemio.[5] Interestingly the jury sent a request to the trial judge to see the statement. The trial judge sent a note to the jury that they could not see the statement (App. C). Thus, the exonerating or exculpating statement was kept from the defendant and the jury. This comprised the knowing suppression of evidence favorable to Bartemio.

The Government misconduct was highlighted by the prosecutor's closing argument which is a glossary of personal opinions and provided "government testimony" absent Government witnesses. The objected to statements are included in the statement of the case.

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[5] Bartemio, had the nickname "Bud"; on Government Exhibit 8 he was to receive certain proceeds from the abortive sale of August 27, 1971 of the bearer bonds; additionally the same exhibit contained a reference to receiving proceeds from the sale of stolen U.S. Savings Bonds which evidence, "dehors" the indictment. This exhibit was admitted, over the objection of Bartemio.

Not by way of limitation but rather by "first impression" this court is requested to review the viability of a two (2) Count indictment which charged conspiracy and aiding and abetting to commit the same act on the same date, i.e. the unlawful possession of stolen bearer bonds on August 27, 1971.

The conspiracy count uses this language:

> "All of the acts of which of the defendants described in Count Two of this indictment, the allegations of which Count are hereby incorporated by reference, are designated as overt acts done in furtherance of and to effect the object of the conspiracy; and, in addition thereto and in furtherance of the conspiracy, the defendants did commit the following overt acts: . . ." (App. B)

The jury acquitted Bartemio of the overall conspiracy, convicted on the "aiding and abetting". There was no evidentiary basis for aiding and abetting other than within the overall conspiracy. The language of the indictment incorporated the aiding and abetting into the conspiracy. Thus, 2 realistic questions are posed. Did the language of the indictment incorporate Count 2 into Count 1? Were it otherwise, what effect, if any, is there by "incorporating by reference" in an indictment? Is not the Sixth Amendment right to notice of the "nature and cause of the accusation" such that its meaning and purpose are to allow a defendant specific notice so that he may prepare a defense, and to guard against the possibility that:

> "Confusion as to the basis of the verdict may subject the defendant to double jeopardy in the event of a subsequent prosecution. . . ." *U.S.* v. *Tanner*, 471 F.2d 128 (7th Cir., 1972).

An opinion of this Court is focal. In *Bollenbach* v. *U.S.*, 326 U.S. 607 (1946) this court reversed a similar conviction finding that an attempt to sell or dispose of bearer

bonds that had been earlier stolen did not make *Bollenbach* an aider and abettor. Here, Bartemio stands acquitted, yet convicted in the same trial of a substantive offense which was pleaded in both counts of a two count indictment. Thus, the questions posed relate to an opinion of this Court; is *Bollenbach* alive and well? Does the import of this opinion carry present day meaning?

Was there a merger of offenses as the Government argued to this court in *U.S.* v. *Falcone,* 311 U.S. 205 (1940)? Was the conspiracy acquittal a determination that the substantive offense was not committed, *Herman* v. *U.S.,* 289 F.2d 362 (5th Cir., 1961); *U.S.* v. *Hunter,* 478 F.2d 1019 (7th Cir., 1973) or, is the verdict so inconsistent it may not stand, *U.S.* v. *Maybury,* 274 F.2d 899 (2nd Cir., 1960) as opposed to *Dunn* v. *U.S.,* 284 U.S. 390 (1932). *Maybury* was a trial absent jury, *Dunn* with jury.

Last, and possibly least, does the power of supervision of this court come into play where the petitioner makes a clear showing that an order affirming this conviction has its predicate on "clearly erroneous" findings of fact? The order affirming this conviction (App. A) made four factual findings in support of their order affirming this conviction. Two (2) findings are clearly wrong. May the conviction yet stand? Does Rule 19(1)(b) of this Court allow review to consider erroneous factual findings?

ARGUMENT

I.

The knowing suppression by the Government of evidence favorable to Bartemio mandates the vacation of conviction and a new trial.

A fifteen (15) page handwritten statement was used by the Government. That is to say, three (3) pages of the handwritten statement of Barbara Quattrochi was used by the Government to provide handwritten proof that Quattrochi had written names and numbers on a piece of paper. The piece of paper (Gv. Ex. 8) was introduced to show that Bartemio was to receive a portion of the proceeds from the abortive sale of stolen bearer bonds; the sale was to have taken place on August 27, 1971. Instead, Quattrochi and others were arrested on that date and charged with the unlawful possession of 189 Oklahoma City Bearer Bonds which had earlier been stolen while in interstate commerce.[6]

The twelve (12) remaining pages of the handwritten statement of Quattrochi were kept from the defendant and the jury.[7] Post appeal the entire statement was given

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[6] At trial Bartemio stipulated that the bonds were stolen while in interstate commerce.

[7] While deliberating the jury sent a third note to the trial judge requesting an opportunity to read "Barbara's Statement". The judge responded by stating that this statement was not in evidence and was used for the limited purpose of providing a sample of her handwriting. The so called statement is not addressed to the matters in issue in the case (R. 52, App. 15, infra).

to Bartemio's counsel. On page 14 of the Statement Barbara Quattrochi states she (and no other person) set up and participated in the abortive sale. Additionally, she states that the entire transaction was the result of her meeting and trusting "Lucky". Lucky as trial facts revealed was a Government informant and was so a part of the entire episode that he was to receive monies from the abortive sale of the bearer bonds (Gv. #8). In any event the statement was not only not proffered for defense inspection but was totally suppressed.

In *U.S.* v. *Coplon,* 185 F.2d 629 (2nd Cir., 1950) a conviction for conspiring to defraud the Government was reversed and the cause remanded in an opinion penned by Chief Judge Learned Hand, and therein, in pertinent part regarding notes or documents not disclosed to the defendant, the court opined:

> "However, the refusal to allow the defense to see them was, as we have said, a denial of their constitutional right, and we can see no significant distinction between introducing evidence against an accused which he is not allowed to see, and denying him the right to put in evidence on his own behalf." (185 F.2d at 638)

Next followed *Jencks* v. *U.S.,* 353 U.S. 657, 77 S.Ct. 1007 (1957) where this court reversed a prosecution for filing a false non-communist affidavit with the National Labor Relations Board because the Government withheld and the court did not order Government statement to be produced for the cross-examination of Government witnesses. This court held that the accused is helpless to know or discover conflicts in report without inspecting them (353 U.S. at 668). In the case at bar the handwritten statement of the guilty pleading, non-testifying conspirator Quattrochi could not only have been used to impeach the testi-

mony of the government witness, Harte,[8] but also the statement could have been proffered by Bartemio to demonstrate that the focal person in the entire "alleged conspiracy" disavowed the involvement of Bartemio. Surely, if the Government were allowed (as they were) to proffer her testimony under the "conspiracy-hearsay exception" then the defendant would have similarly been allowed the same benefit. Being mindful that the split verdict and the acquittal of the overall conspiracy is certainly suggestive of a close case, there was fundamental error in suppressing this favorable statement.

Later opinions of this court are dispositive of the Government's duty as it relates to the suppression of evidence favorable to the defendant. In *Brady* v. *Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963) this court affirmed the remanding of a state prosecution for re-trial on the question of punishment where it was demonstrated that the withheld materials would not have changed the trial result. This court stated as follows:

> "We agree with the Court of Appeals that suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment. The Court of Appeals relied in the main on two decisions from the Third Circuit Court of Appeals—United States ex rel. Almeida v. Baldi, 195 F.2d 815, 33 A.L.R. 2d 1407, and United States ex rel. Thompson v. Dye, 221 F.2d 763—which, we agree, state the correct constitutional rule.

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[8] Harte was a Government informer-witness who had spent most of his life being an international courier of stolen securities. He testified that Bartemio and not Quattrochi attempted to peddle the Oklahoma Bonds on August 25, and 26, 1971. His skill in his trade allowed his nickname to become "The Professor" (Tr.561).

This ruling is an extension of Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791, where the Court ruled on what nondisclosure by a prosecutor violates due process:

> 'It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.''

In Pyle v. Kansas, 317 U.S. 213, 215-216, 63 S.Ct. 177, 178, 87 L.Ed. 214, we phrased the rule in broader terms:

> ''Petitioner's papers are inexpertly drawn, but they do set forth allegations that his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, and from the deliberate suppression by those same authorities of evidence favorable to him. These allegations sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody. Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791.''

The Third Circuit in the Baldi case construed that statement in Pyle v. Kansas to mean that the 'suppression of evidence favorable' to the accused was itself sufficient to amount to a denial of due process. 195 F.2d, at 820. In Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217, we extended the test formulated in Mooney v. Holohan when we said: 'The same result obtains when the State, although not soliciting false evidence, allows it to go uncor-

rected when it appears.' And see Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9; Wilde v. Wyoming, 362 U.S. 607, 80 S.Ct. 900, 4 L.Ed.2d 985. Cf. Durley v. Mayo, 351 U.S. 277, 285, 76 S.Ct. 806, 811, 100 L.Ed. 1178 (dissenting opinion).

We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (373 U.S. at 886, 887)

In 1967 this court reviewed another appeal from the State of Maryland in *Giles* v. *Maryland*, 386 U.S. 66, 87 S.Ct. 793 (1967). This court vacated an opinion by the Maryland State Court of Appeals which reversed the granting of a new trial by the trial court in a post-conviction proceeding based on the knowing suppression of evidence favorable to the defendant. It appears that this court would have vacated the conviction but for the fact that a state tribunal was involved (386 U.S. at 81, 82). The question posed but not decided in *Giles* was whether the prosecution's constitutional duty to disclose extends to all evidence admissible and useful to the defense, and the degree of prejudice which must be shown to make necessary a new trial (ante, at 74). This court declined to decide the question instead basing the remand on principles already set forth in *Napue* v. *Illinois*, 360 U.S. 264, 79 S.Ct. 1173 (1959) which held that a conviction must fall under the Fourteenth Amendment when the prosecution "although not soliciting false evidence, allows it to go uncorrected when it appears", even though the testimony may be relevant only to the credibility of a witness. In the case at bar the credibility of the Government witness, Harte, was surely in issue and the suppressed statement, inter alia, went to his credibility.

In *Moore* v. *Illinois*, 408 U.S. 786, 92 S.Ct. 2562 (1972) this court's majority opinion found that the defendant was not denied Fourteenth Amendment due process by the State's failure to produce misidentification evidence relating to the defendant. Inter alia, this court considered whether there was a specific request for the untendered information and whether it was material (408 U.S. at 794, 795). This court measured the importance of the suppressed evidence as follows: (a) Whether the suppression by the prosecution was after a request by the defense, (b) the evidence's favorable character for the defense and (c) the materiality of the evidence (ante, at 795). After reviewing the suppressed evidence this court found that the suppressed identification evidence was not material to the issue of guilt (ante, at 797, 798). Albeit affirming the murder conviction the majority opinion noted:

> "We adhere to the principles of Brady and Napue, but hold that the present record embraces no violation of those principles . . ." (408 U.S. at 798).

The dissenting opinion finds that the knowing suppression of evidence merits a new trial because of the failure of the prosecution to disclose evidence suppressed (408 U.S. at 807, 808).

In this case the suppressed statement was at all times in the possession of the Government. The statement's content was material, beyond a doubt. It controverted the proffered testimony of Government witnesses; its use both for purposes of impeachment and as evidence negating the guilt of Bartemio are beyond argument. The jury's curiosity was peaked to the point where they wished to see the statement. Even the Court was unaware of its content; were it otherwise the court may well have directed that the jury have the benefit of this statement during their deliberation.

Accordingly, Petitioner, Bartemio, respectfully prays that this court vacate this conviction and remand this cause to the district court for a new trial.

II.

The government's misconduct further denied Bartemio a fair trial by virtue of their closing argument which consisted of a series of personal opinions by the Government prosecutor as to Bartemio's guilt.

The Statement of the Case, ante, excerpts directly from the trial record 7 statements made by the U.S. Attorney to the jury during his closing argument. The representative of the sovereign variously told the jury about matters of significance of which the Government had no proof. As example:

> "I think that has some significance in this case, that he was introduced as Frankie. I think the significance is that there was no need for Dal Porto to know the other conspirators, that Barbara Quattrochi had no need to have Dal Porto know about the defendant, Bartemio. But you are free to reason a logical inference of what you think that meant, but I think that it meant that he was trying to hide or keep Bartemio a secret from Dal Porto". (Tr. 751, 752)
>
> • • •
>
> "Ladies and gentlemen, a crucial conversation took place there which I think the evidence shows places Bartemio as an important co-conspirator in this case.
>
> Mr. Ackerman: Your Honor, the defendant will object to the personal opinion of the prosecutor." (Tr. 755, 756)
>
> • • •
>
> "Mr. Lord: On the date that the defendant, Bartemio, had a conversation with Maurice Harte, wherein Buddy, as Harte knew Bartemio, told him that Oklahoma City bearer bonds were available. These Oklahoma bearer bonds, I submit to you.

SUPPLEMENT TO ARGUMENT I

A careful review of the trial transcript compels petitioner to file a supplement to Argument 1, infra.

On May 1, 1973 the jury forwarded a note to the trial judge asking that they be able to read "Barbara's Statement." The trial judge, with all counsel and defendants present, considered the request and certain language therein appears which petitioner's counsel feels compelled to include in this Petition.

Bartemio's attorney, initially, objected to the court proffering the 15 page handwritten pre-sentence statement. He stated, inter alia,:

"As to what they have asked for, which was Government Exhibit 13, they are not entitled to. They are not entitled to have that read, and they are not entitled to have—" (Tr. 889).

The Court opined:

The Court: I don't either, but couldn't that be handled —couldn't we stay—it was a handwritten statement on another matter that had nothing to do with this case, and it was offered as a sample of her handwriting, so the handwriting expert could use it (Tr. 889, 890).

Further colloquy follows:

"Mr. Echeles: So long as you say it has nothing to do with this case.

The Court: That is what I propose to tell them.

Mr. Echeles: I have no objection to that, your Honor.

The Court: They think something has been held up from them, and we want—

Mr. Echeles: As to Brennan I have no objection. I speak only for Brennan.

The Court: All right.

Mr. Stevens: I think that would be all right, your Honor, within those limits.

The Court: Mr. Ackerman?

Mr. Ackerman: On behalf of Mr. Bartemio, if your Honor choses to do that, which may well be the best thing, I don't know, but I have to object to it, because it is not responsive to the question they have asked the Court.

The Court: All right, I'll go ahead and do it.

It is responsive, I think, Mr. Ackerman, because they ask that Barbara Quattrochi's statement be read. Although they heard about a statement of Barbara Quattrochi, it was a handwriting exemplar, and the contents of it had nothing to do with the case.

Mr. Echeles: So long as your Honor adds that, I have no objection.

Mr. Massie: Let's just call it "extemporaneous handwriting," which we know was written in her hand.

The Court: It wasn't a statement.

Mr. Echeles: It was identified as a statement given to a probation officer, so they may be concerned.

The Court: They may be. Why don't we—you what we could do: It was given to a probation officer, but it related to, if it is the statement I'm thinking of and I have

seen it, it related to her family situation and, you know, why she should—why her family needed her and that sort of thing, and it had nothing at all to do with the offenses in this case.

Mr. Ackerman: That is only true in part, because I asked to see Government's Exhibit 13. There are a couple of pages full of "Lucky" there and how "Lucky" got her into this. That is in that statement.

The Court: When I read it, it went over my head, because I didn't know who Lucky was at the time I read it. I sentenced her, you know, long before I knew about the rest of the case, and I was relying on my memory in ruling at that time. (Tr. 890, 891)

Earlier statements of the petitioner that neither the court nor Petitioner's counsel had seen or read the statement are controverted by this trial transcript colloquy. Clearly, the court had approximately a year earlier read the statement but as the court observes:

> "It was a handwriting examplar, and the contents of it had nothing to do with the case." (Tr. 890, 891).

As the government well knew, this was absolutely not true. Several pages of this pre-sentence investigation spoke of the informer (Lucky), the undercover agent and the actual event which Barbara Quattrochi describes as something she ALONE (emphasis ours) set up. Additionally, the colloquy suggests that Barbara's trial counsel saw the "statement" (Tr. 891). Bartemio's counsel saw but three (3) pages of this fifteen (15) page statement. Were it otherwise it would have been down-right silly to suggest that trial counsel would object to having an exonerating statement be sent to the jury. The only plausible conclusion is that Bartemio's trial counsel did not see the full statement until post-appeal.

In point of fact Petitioner's counsel now has a xerox copy of the entire fifteen (15) page statement. It was tendered to him with the proviso that it would not be published.

Prior to trial Bartemio's counsel filed a motion under *Brady* v. *Maryland*, ante, for any evidence favorable to the defendant. The Government tendered only three (3) pages of Barbara's handwritten statement. They disclaimed possessing or having knowledge of any other favorable evidence. Again, this was simply not true.

This supplement is respectfully submitted so that this court is in nowise mislead as to the trial colloquy.

Going further to the credibility of Mr. Harte's testimony about the conversation, Buddy Bartemio told Harte that he had another deal pending, and I think the evidence shows that that 'other deal pending' was with Agent Dal Porto.

Mr. Ackerman: Same objection, if the Court please." (Tr. 756)

* * *

"Mr. Lord: I think the evidence does show at this point that Mr. Bartemio wanted to get 15 percent from Mr. Harte, because he had already arranged for a 12 percent purchase of these bonds.

Ladies and gentlemen, I think that lends credibility. I think the evidence shows that—

Mr. Ackerman: Your Honor, may I just make a standing objection then?

After the trial judge admonished the Government prosecutor to refrain from thus continuing to "personally argue to the jury", the prosecutor continued:

"But I think that there has been no showing that Maurice Harte was not telling the truth about those conversations that he had with Angelo Bartemio regarding Oklahoma City bonds.

Ladies and Gentlemen, the climax of this case occurred on August 27, 1971, for on that date the deal, the negotiation and sale of these stolen bearer securities was to be consummated, and on that date about 4:00 p.m. Special Agent Sheridan testified that he was present at the Barbara Quattrochi residence, and he observed again the defendant, Bartemio, at that location.

* * * * *

The evidence is clear that Mr. Bartemio made surveillances in the area. There was a good reason for that: Mrs. Quattrochi was about to sell $945,000 in stolen bearer securities. She wanted some protection, surveillance protection for that, and the defendant, Bartemio, provided it at that time.

Defendant Bartemio offered explanations which I do not find logical—

Mr. Ackerman: Objection, if the Court please.

Mr. Lord: —which I do not think you should find logical—

Mr. Ackerman: Same objection.

The Court: All right. Mr. Lord is expressing his personal opinion, so refrain from doing so, Mr. Lord. I am sure you do not intend to express your personal opinion.

Mr. Lord: Sorry, your Honor." (Tr. 758).

". . . But, I think the evidence shows, is the defendant, Buddy Bartemio, and the share he was to receive." (Tr. 761)."

This court in *Berger* v. *U.S.*, 295 U.S. 78, 55 S.Ct. 629 (1934) reversed a jury verdict of guilty to the offense of conspiracy to utter counterfeit notes because of the improper cross-examination and closing argument by a Government attorney. This court while reversing allowed that the United States Attorney is not an ordinary party to a controversy, but is the representative of the sovereign (295 U.S. at 88). This court went on to state:

"It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

"It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. The court below said that the case against Berger was not strong; and from a careful examination of the record we agree. Indeed, the case against Berger, who was convicted only of conspiracy and not of any

substantive offense as were the other defendants, we think may properly be characterized as weak—depending, as it did, upon the testimony of Katz, an accomplice with a long criminal record." (55 S.Ct. at 88, 89)[9]

In *U.S.* v. *Wasko,* 473 F.2d 1282 (7th Cir., 1973) the Court of Appeals reversed a narcotics conviction because the government prosecutor, over objection, was allowed to advise the jury that the prosecutor didn't think certain evidence was really important (473 F.2d at 1283). *Wasko,* quoting from *Greenberg* v. *U.S.,* 280 F.2d 472 stating as follows:

"To permit counsel to express his personal belief in the testimony (even if not phrased so as to suggest knowledge of additional evidence not shown to the jury), would afford him a privilege not even accorded to witnesses under oath and subject to cross-examination. Worse, it creates the false issue of the reliability and credibility of counsel. This is peculiarly unfortunate if one of them has the advantage of official backing. The resolution of questions of credibility of testimony is for impartial jurors and judges. The fact that government counsel is, as he says, an advocate is the very reason why he should not impinge upon this quasi-judicial function. We believe the canon to be elemental and fundamental." 280 F.2d at 475.

See also United States v. Cotter, 425 F.2d 450, 453 (1st Cir. 1970). (473 F.2d at 1284)

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[9] The similarity between *Berger* and the case at bar is not without interest. Berger was acquitted of substantive counts and his conviction depended on the statement of an accomplice, Katz, who had a long criminal record (55 S.Ct. at 89). Bartemio was acquitted of conspiracy but convicted of the *included* substantive offense and the testimony used to convict was in great part that of an alleged accomplice, Harte, who had a long criminal history.

In *United States* v. *Socony-Vacumn Oil Company, et al.*, 310 U.S. 150, 60 S.Ct. 811 (1940) this court reversed the Court of Appeals for the Seventh Circuit after that court had granted a new trial in a lengthy conspiracy in restraint of trade case. As relating to prejudicial closing argument this court found that the statements by the Government attorney were improper and error; but not prejudicial error in light of the length of the case and the failure of defense counsel to object (310 U.S. 241, 242).

In the case at bar the Government conceded error as to the closing argument and, indeed, the Court of Appeals found error but, sub nom, found the error either non-prejudicial or harmless. It would appear that while condemning the government, the Court of Appeals, sub nom, found the error harmless beyond a reasonable doubt, c.f. *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824 (1967). It strains imagination to suggest that a concededly erroneous closing argument can be harmless beyond a reasonable doubt in a close split-verdict jury trial. By his closing argument the prosecutor testified to that which he was unable to prove, i.e. "I think the evidence shows—places Bartemio as an important co-conspirator in this case" (Tr. 755, 756) . . . "and I think the evidence shows that the other deal pending was with agent Dal Porto" (Tr. 756)[10] . . . "I think the evidence does show at this point that Mr. Bartemio wanted to get fifteen (15) percent from Mr. Harte, be-

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[10] Dal Porto testified both for the Government and the defense. This undercover Secret Service Agent testified during the entire investigation he never heard of Bartemio, or that Bartemio's name was never mentioned (Tr. 647, 648).

cause he had already arranged for a twelve (12) percent purchase of these bonds'"[11] . . .

> "The evidence is clear that Mr. Bartemio made surveillances in the area. There was a good reason for that: Mrs. Quattrochi was about to sell $945,000 in stolen bearer securities. She wanted some protection, surveillance protection for that, and the defendant, Bartemio, provided it at that time.
>
> Defendant Bartemio offered explanations which I do not find logical . . . (Tr. 757, 758).
>
> Mr. Ackerman: Objection, if the Court please.
>
> Mr. Lord: —which I do not think you should find logical—

Thus, by the addition of the prosecutor's personal opinions he supplies the jury with evidence no government witnesses were able to proffer. Can the Government seriously contend this is non-prejudicial error when they concede to the Court of Appeals that the argument was error and where the same prosecutor suppressed evidence which could have shown that the statements that he was making to the jury were, in fact, false. This was a close jury case. The evidence as to Bartemio can hardly be considered overwhelming. Nowise does the Court of Appeals suggest the proof as being overwhelming notwithstanding their affirmation of this conviction. Surely, the sovereign may not profit from his misdeeds. His interest in a criminal prosecution is not that he shall win a case, but that justice shall be done, (*Berger* v. *U.S.*, 295 U.S. at 88).

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[11] The U.S. Attorney is now talking about an alleged agreement between Quattrochi and Dal Porto, the undercover agent. There is absolutely no trial testimony to suggest Bartemio was even privy to what went on between Quattrochi and Dal Porto. All Quattrochi testimony came in as an exception to the hearsay rule, the conspiracy exception.

III.

(A) Was Bartemio denied his Sixth Amendment right of the "Nature and cause of the accusation against him" by being compelled to stand trial on a duplicitous indictment?

(B) Where one count of an indictment charges more than one offense is it duplicitous as a matter of law and therefore void?

(C) What is the effect of incorporating by reference as per Rule 7(c)[12] of the Fed.R.Crim.Proc. when the substantive count of a two count indictment is incorporated by reference into the conspiracy count and considered there as an overt act?

(D) Whether Bartemio's acquittal on the conspiracy count which incorporated the "aiding and abetting into the conspiracy" requires a reversal of the conviction where before, during and post-trial Bartemio moved to dismiss Count two as being duplicitous?

(E) Whether Bartemio's acquittal on the overall conspiracy offense which had incorporated the aiding and abetting as an overt act requires a new trial where almost all of the trial testimony was admitted under the conspiracy-hearsay exception Rule?[13]

The last question has recently been answered. In *Lucido* v. *U.S.*, 486 F.2d 868 (6th Cir., 1973) that Court of Appeals reversed a conviction for the substantive offense of gambling where the defendant had been acquitted by the

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[12] Rule 7(c), in pertinent part, reads:

". . . Allegations made in one Count may be incorporated by reference in another count . . .".

[13] *Cf.* Anderson, et al., v. U.S., ... U.S. ....., 94 S.Ct. 2253 at 2259, 2260 (1974).

same jury of the over-all conspiracy. While addressing the admission of prejudicial hearsay that court commenced as follows:

> "However, acquittal on the conspiracy charge makes necessary inquiry into the possible prejudice that resulted from the introduction of this evidence. Absent the hearsay charge was there any other exception to the hearsay rule that would make the agents' testimony concerning Dawson's conversations admissible against the appellant?" (486 F.2d at 689).

The *Lucido* Court then continues and quotes from this court:

> "This case is an example of the potential hazards to a fair trial when the charge of conspiracy coupled with substantive charges confers upon the government a substantial procedural advantage. The Supreme Court has long recognized the dangers incident to the use of a conspiracy charge by government prosecutors. E. g. *United States* v. *Falcone*, 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128 (1940). This is not to say that the selective use of the conspiracy charge may not be a valid and necessary practice in proper law enforcement. What must be guarded against are the potentialities for injustice so clearly perceived by Mr. Justice Jackson in his oft-quoted statement, in his concurring opinion in *Krulewitch* v. *United States*, 336 U.S. 440, 457, 69 S.Ct. 716, 725, 93 L.Ed. 790 (1949):
>
> > There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers. But statutes authorize prosecution for substantive crimes for most evil-doing without the dangers to the liberty of the individual and the integrity of the judicial process that are inherent in conspiracy charges. We should disapprove the doctrine of implied or constructive crime in its entirety and in every manifestation. And I think there should be no straining so uphold any conspiracy conviction where prosecution for the substantive offense is

> adequate and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction.

Although Mr. Justice Jackson was concerned with review of a conspiracy conviction, the spirit of his condemnation is equally applicable in this case. Since the jury has found that the conspiracy was not established, the government's admissible evidence on the substantive charge is vastly reduced. The purpose of rules of evidence is to preserve procedural fairness for all parties to a proceeding. To permit hearsay evidence to support a substantive charge on the theory of the 'conspiracy' exception where the charge of a conspiracy has been specifically rejected by the jury would not only undercut the very foundation of the exception, but would magnify the dangers to the liberty of the individual and the integrity of the judicial process which gave Mr. Justice Jackson so much concern in the conspiracy cases. The hearsay was admitted below only because of the conspiracy charge which was not established. Therefore, the defendant is entitled to a new trial on the substantive charge. United States v. Johnson, 334 F.Supp. 982 (1971), aff'd 462 F.2d 608 (8th Cir. 1972) . . . ." (486 F.2dC. 869, 870)

Almost the totality of the trial evidence comprised the conspiratorial conversations between Quattrochi and an undercover Secret Service Agent, Leroy Dal Porto. Her statements, declarations and writings were, in toto, presented to the jury albeit she never testified. That which Government witnesses were unable to supply the Government attorney supplied in his closing argument (Point I, infra). Limiting instructions provide no solace, *Bruton* v. *U.S.*, 391 U.S. 123, 88 S.Ct. 1620 (1968). A *Bruton* lesson from this court states:

> "Nevertheless, as was recognized in Jackson v. Denno, supra, there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so

vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. . . .'' (id. at 135)

Bruton ultimately reverses the postal Robbery conviction finding that

> ". . . we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. . .'' (id. at 137).[14]

Bartemio asks not for a perfect trial, only a fair one, *Lutwak* v. *U.S.*, 344 U.S. 604, 73 S.Ct. 481 (1953).

Bartemio could cross-examine neither the absent conspirator, Quattrochi, nor the Government attorney. The less than fair trial standard, *Lutwak,* supra, should entitle Bartemio to a new trial. If not *Lutwak* then *Chapman* v. *California,* ante, might well compel a finding under this point that the hearsay conversations, all admitted over objection, could not conceivably be harmless error beyond a reasonable doubt.

THE INDICTMENT

For simple clarity the indictment is included herein as Appendix B. Within the conspiracy count this language appears:

> All of the acts of which of the defendants described in Count Two of this indictment, the allegations of

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[14] The sole limiting instruction in this case was as follows:

If it is established beyond a reasonable doubt that a conspiracy existed and that each defendant was one of its members, then the acts and declarations of any other member of such conspiracy in or out of such defendant's presence, done in furtherance of the objects of the conspiracy and during its existence, may be considered as evidence against such defendant. When persons enter into an agreement for an unlawful purpose, they become agents for one another.

However, statements of any alleged conspirator which are not in furtherance of the conspiracy, or made before its existence or after its termination, may be considered as evidence only against the person making them. (R. 53)

> which Count are hereby incorporated by reference, are designated as overt acts done in furtherance of and to effect the object of the conspiracy; and, in addition thereto and in furtherance of the conspiracy, the defendants did commit the following overt acts: (App. B)
>
> What means "incorporation by reference"? Incorporate means "unite intimately" or "assimilate". Synonyms are "fuse" or "merge", *American Photocopy Pub. Co.* v. *Ziff-Davis Pub. Co.*, 135 Fed. 2nd 569 (7th, 1943).

An accepted definition of incorporation by reference is "the permissible practice of referring to, and thereby making a part of one count or defense, the whole or part of the allegations of another count or defense in the same pleading" 41 Am. Jl. St. Pl. §58. These definitions coincide with the interpretation Bartemio stresses herein. Simply stated, we mean that the incorporation by reference put two separate offenses in a single count, thus rendering the count duplicitous and void, *U.S.* v. *Tanner*, 471 F.2d 128 (7th Cir., 1972, at 139, 141).[15]

In *U.S.* v. *Kahn*, 381 F.2d 824 (7th Cir., 1967) while affirming a conviction for misapplying funds deposited in a federally insured depository reviewed a conspiracy indictment which included overt acts and found:

> "Consequently, an overt act was required to be alleged along with conspiracy to constitute the offense under the federal statute.
>
> SINCE AN OVERT ACT IS PART OF THE OFFENSE, (emphasis ours) we see no reason why it may not be used to clarify the remainder of the count. This reading of the count as a whole is in accord with modern practice in reading indictments.

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[15] Assuming, arguendo, that *in this case* (emphasis ours) "aiding and abetting" was a separate offense.

Cf. Smith, supra; Hagner, supra; . . ." (381 F.2d at 830)[16]

In *Russell et al.* v. *U.S.*, 369 U.S. 749, 82 S.Ct. 1038 (1962) this court reversed several convictions based on the refusal of Russell and others to answer questions before a Congressional Subcommittee. Each petitioner was indicted and convicted. This court reversed the convictions and discussed the criminal indictment. The convictions were reversed because of faulty indictments. In so finding this court opined:

> " * * 'In an indictment upon a statute, it is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished; * * *.' United States v. Carll, 105 U.S. 611, 612 [26 L.Ed. 1135]. 'Undoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.' United States v. Hess, 124 U.S. 483, (ante, at 765)

Earlier in *Russell,* ante, this court commenced the review of the content of an indictment by setting forth the Sixth Amendment "in all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation; . . ." (ante, at 761).

In *Herman* v. *U.S.*, 289 F.2d 362 (5th Cir., 1961) the Court of Appeals held that in an interstate transportation of stolen goods indictment a conviction could not be sus-

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[16] A lengthy footnote follows this quote; *Smith,* supra, refers to *Smith* v. *U.S.*, 260 U.S. 1, 79 S.Ct. 991 (1959); *Hagner,* supra, refers to *Hagner* v. *U.S.*, 285 U.S. 427, 52 S.Ct. 417 (1932).

tained where the substantive offense was an overt act on the conspiracy count and there was an acquittal of the substantive offense. The court found that the acquittal of the substantive offense constituted a determination that the overt act was not committed (289 F.2d at 368). In the case at bar the substantive offense was incorporated into the conspiracy count and the defendant was acquitted of the conspiracy offense. Did that not therefore constitute a determination that the substantive offense was NOT COMMITTED (emphasis ours); c.f. *Herman* v. *U.S.*, ante at 368.

Aiding and abetting was not a separate offense in this case.

Were the Government to argue contra then they admit, sub nom, that Bartemio was charged with two separate offenses in a single conspiracy count. Is aiding and abetting a separate offense? This court has so found, *Pinkerton et al.*, v. *United States*, 328 U.S. 640, 66 S.Ct. 1180 (1946). In *Pinkerton*, the cause was presented after Walter and Daniel Pinkerton had each been found guilty of conspiracy to commit violations of the Internal Revenue Code. Overt acts were charged in the conspiracy which were the same acts charged in the substantive count. The question presented to this court related to whether SEPARATE PENALTIES (emphasis ours) could be imposed after being found guilty of both the conspiracy and the substantive offenses. This court found that for "penalty purposes" there was no merger and affirmed the sentences. The only question presented was whether the sentences merged (ante, at 642). While reviewing the law, conspiracy viz-a-viz substantive offenses this court found:

> "There are, of course, instances where a conspiracy charge may not be added to the substantive charge. One is where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime." (ante, at 643)

The *Pinkerton* case involves separate years of tax evasion. The case now presented involves a single instance of attempting to peddle bearer bonds that had long earlier been stolen or taken from interstate commerce.[17]

This court has yet to review and decide whether the acquittal of the conspiracy offense which incorporated the substantive offense compels a finding of merger. In *Braverman et al.*, v. *U.S.*, 317 U.S. 49, 63 S.Ct. 99 (1942) this court reviewed the question of whether a single conspiracy to violate tax laws would sustain a sentence of imprisonment that exceeded the maximum penalty for a single conspiracy (ante, at 50). This court found that for the purposes of sentencing a single conspiracy could not result in a sentence that exceeded two years, accordingly this court reversed the conviction. Again, the court was confronted with multiple convictions for conspiracy offenses as opposed to the situation herein presented, e.g. an acquittal of the conspiracy where the substantive offense was pleaded as an overt act and specifically incorporated by reference into the conspiracy count. In *Nye & Nissen* v. *U.S.*, 336 U.S. 613, 69 S.Ct. 766 (1949) this court reviewed convictions for war time violations relating to the submission of false invoices to the Government from 1938 to 1945 (ante, at 615, 616). The defendants were there convicted both of the conspiracy to commit that offense and several substantive counts. This court held that there was no merger of the offenses and found that

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[17] Bartemio stipulated that the bonds were taken while in transit to New York from Chicago some time in December of 1970.

"aiding and abetting has a broader application" (ante, at 620). In *Nye & Nissen* there was a seven year conspiracy and any number of false invoices comprised the substantive counts. This court did state:

> ". . . Nor was the submission in conflict with Pinkerton v. U.S., supra. The rule of that case does serve where the conspiracy was one to commit offenses of the character described in the substantive counts" (ante, at 620).

In the case at bar the conspiracy describes the substantive offense and, in fact, includes the single substantive offense as part of the conspiracy.

The Government has never suggested either to the District Court or to the Court of Appeals that in this case separate elements of proof were involved, c.f. *Pereira* v. *U.S.*, 347 U.S. 1, 74 S.Ct. 358 (1954). In *Pereira* this court stated:

> "only if the substantive offense and the conspiracy are identical does a conviction for both constitute double jeopardy" (347 U.S. at 11).

Conspiracy considers the necessity of "agreement"; aiding and abetting needs no agreement (ante, at 11, 12).

In the case at bar there could be no aiding and abetting absent the conspiracy. The aiding and abetting was pleaded as part of the conspiracy. In theory one could aid and abet absent agreement, *U.S.* v. *Peoni*, 100 F.2d 401 (2nd Cir., 1938). In the context of this case it is impossible to conceive of the aiding and abetting as not being part of the conspiracy. Indeed, one of findings of fact by the Court of Appeals while affirming this conviction found that after Quattrochi left for the abortive sale of the bearer bonds Bartemio drove around in a diversionary manner (App. A). This was pleaded as part of the conspiracy. Were he driving around absent the agreement of the co-conspirator his actions would be meaningless.

Was there a merger? Absent any separate element there must be a merger, *U.S.* v. *Hunter,* 478 F.2d 1019 (7th Cir., 1973), *U. S.* v. *Manson, et al.,* 494 F.2d 804 (7th Cir., 1974). In *Blockburger* v. *U.S.,* 284 U.S. 299, 52 S.Ct. 180 (1932) this court affirmed a consecutive sentence imposed after the defendant was convicted on three counts of a five count indictment. *Blockburger* contended to this court that consecutive sentences could not stand because there was but one offense (ante, at 301). This court found to the contrary and affirmed the consecutive sentences finding that the separate narcotics sales constituted separate offenses (ante, at 304).

Thus, this court has consistently held that where there are separate offenses there is no merger, *Blockburger* v. *U.S., Nye & Nissen* v. *U.S.,* ante (C.f. *Braverman* v. *U.S.,* ante, reversing because only a single conspiracy; in effect, a merger where the single conspiracy comprised the offense charged).

In *Hunter,* ante, the Court of Appeals for the Seventh Circuit affirmed a gambling conviction, while reversing the conviction which charged conspiracy to commit the illegal gambling that had been charged in Count 2 of the *Hunter* indictment (478 F.2d at 1022). In discussing merger the *Hunter* Court opined:

> "... We find 'no ingredient in the conspiracy (charged in Count 1) which is not present in the completed crime (charged in Count 2)'. Pinkerton v. U.S., 328 U.S. 640, 643, 66 S.Ct. 1180, 1182, 90 L.Ed. 1489" ... 478 F.2d at 1026.

This language provides significant insight into the growing apprehension of the conspiracy indictment. The *Hunter* opinion does not even discuss the penalties imposed on *Hunter* as a result of his being convicted of both counts in the two count indictment. It appears that the Seventh Circuit finds "merger" where other circuits refuse, *Ehrlich*

v. *U.S.*, 238 F.2d 481 (5th Cir., 1957) affirming conviction on substantive counts of violating Lanham Act albeit acquittal on the conspiracy count; *U.S.* v. *Giuliano*, 348 F.2d 217 (2nd Cir., 1965) convicting on substantive counts involving interstate transportation of stolen securities where defendants acquitted on the conspiracy count.[18]

The split in Circuits is ample reason to grant review and resolve this troublesome question i.e. merger, vel non (*U.S.* v. *Hunter*, ante, at 1023).

The nature of this argument necessarily includes the question of what to do with inconsistent verdicts. Should this court re-visit *Dunn* v. *U.S.*, 284 U.S. 390, 52 S.Ct. 189 1932). *Dunn* affirmed a liquor violation albeit the same jury had acquitted *Dunn* of two counts of the three count indictment (284 U.S. at 392). The same evidence was proffered on the three counts in that case. This court held the acquittal of two of the three counts failed to necessitate the finding of an inconsistent verdict.[19]

It would appear that the circuits are not in accord as to what to do with inconsistent verdicts. In *U.S.* v. *Maybury*, 274 F.2d 899 (2nd Cir., 1960) the court reversed a conviction for uttering a check knowing to have been falsely endorsed in violation of 18 U.S.C. §495. In *Maybury* trial

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[18] Affirmation of conviction in *U.S.* v. *Giuliano* was based on the fact that there were different elements in the two crimes charged; in the case at bar no separate elements were even suggested to be present. In fact, the charge to the jury left no distinction between the necessity of knowing the bonds were removed from interstate commerce. The charge to the jury as to both counts affirmatively stated it was unnecessary to prove that the defendant(s) knew the goods were stolen "from an interstate shipment" (R.53).

[19] Mr. Justice Butler dissented finding the verdict irreconcilable, (ante, at 399, 400).

was without jury and the court acquitted *Maybury* of the first count, forgery. While reversing the court recognized that the inconsistent finding by the trial judge mandated a new trial.

Lending added credence to Bartemio's position in this court we would cite three cases from this court, all adoptive of Petitioner's position. In *U.S.* v. *Falcone, et al.*, 311 U.S. 205, 61 S.Ct. 204 (1940) this court affirmed the reversal of convictions for conspiracy to violate revenue laws involving the operation of illicit stills finding, inter alia, that sellers and buyers of goods were not conspirators (311 U.S. at 207). This court refused to consider an argument proffered by the government:

> "But the Government does contend that one who with knowledge of a conspiracy to distill illicit spirits sells materials to a conspirator knowing that they will be used in the distilling, is himself guilty of the conspiracy. It is said that he is, either because his knowledge combined with his action makes him a participant in the agreement which is the conspiracy, or what is the same thing he is a principal in the conspiracy as an aider or abettor by virtue of § 332 of the Criminal Code, 18 U.S.C. § 550, 18 U.S.C.A. § 550, which provides: "Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal." (311 U.S. at 208)

It is fascinating to observe that the Government there contended that which Bartemio now contends, i.e., that conspiracy and aiding and abetting may well be the same thing (id. at 208). This court would not consider this argument because the government had not raised the argument in the court below (id. at 208). Bartemio did. He so contended both in the trial court and in the Court of Appeals, albeit, to no avail.

In *Bollenbach* v. *U.S.*, 326 U.S. 607, 66 S.Ct. 402 (1946) this court reversed a similar conviction finding that the attempted selling or fencing of securities already stolen from interstate commerce did not make Bollenbach an aider and abettor (326 U.S. at 610, 611). Bartemio according to the Government's theory was both a conspirator and an aider and abettor in the unlawful possession of bearer bonds already stolen.[20] It was further the

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[20] 18 U.S.C.A. §2:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. §659 (in pertinent part):

". . . Whoever embezzles, steals, or unlawfully takes, carries away, or by fraud or deception obtains with intent to convert to his own use any baggage which shall have come into the possession of any common carrier for transportation in interstate or foreign commerce or breaks into, steals, takes, carries away, or conceals any of the contents of such baggage, or buys, receives, or has in his possession any such baggage or any article therefrom of whatever nature, knowing the same to have been embezzled or stolen; or

Whoever embezzles, steals, or unlawfully takes by any fraudulent device, scheme, or game, from any railroad car, bus, vehicle, steamboat, vessel, or aircraft operated by any common carrier moving in interstate or foreign commerce or from any passenger thereon any money, baggage, goods, or chattels, or whoever buys, receives, or has in his possession any such money, baggage, goods, or chattels, knowing the same to have been embezzled or stolen—

Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both. . . ."

government's theory that on August 27, 1971 when Barbara Quattrochi went to sell the bonds that he drove around in a diversionary fashion. Taking the evidence in a light most favorable to the government, *Glasser* v. *U.S.*, 315 U.S. 60 (1942) then Bartemio was aiding or abetting the disposition of bonds already stolen. *Bollenbach,* would thus prohibit conviction under those circumstances. The government, neither by way of proof nor suggestion, indicated that Bartemio was the actual procurer of the bearer bonds. The bonds were, by stipulation, found to have been taken from interstate commerce 8 months prior to the attempted sale. If Bollenbach is alive and well Bartemio's conviction should yet be reversed. In *Sealfon* v. *U.S.*, 332 U.S. 575, 68 S.Ct. 237 (1948) this court reversed a conviction for uttering false or forged invoices to the United States involving the sale of sugar with the purpose of defrauding the government. In an earlier trial *Sealfon* had been charged with conspiracy to commit the same offense. He was acquitted. This court held that the acquittal precluded the later conviction for the substantive offense (332 U.S. at 580). Bartemio well understands that the *Sealfon* rationale has not been applied where only one trial occurs, *Ross et al.*, v. *U.S.*, 197 F.2d 660 (6th Cir., 1952); *U. S.* v. *Petti*, 168 F.2d 221 (2nd Cir, 1948). Bartemio respectfully urges that where identical facts are proffered an acquittal on the conspiracy which explicitly incorporated the substantive offense into the conspiracy brings the *Sealfon* rationale into viability, c.f. *Terman* v. *U.S.*, 289 F.2d 362 at 368, 369.[21]

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[21] This argument gathers greater merit because the court made no distinction in instructing the jury as to the "interstate elements" as between the conspiracy to violate 18 U.S.C. 659, and the substantive offense of aiding and abetting in violation of 18 U.S.C. 659 (R.53).

Thus, Bartemio respectfully urges this court to review this conviction in that there is a substantial split in circuits as to whether the acquittal of the substantive offense makes, sub judice, a determination that the offense was not committed, *Herman* v. *U.S.*, ante, *U.S.* v. *Mayberry,* ante, *U.S.* v. *Hunter,* ante, all holding contra to the case at bar.

IV.

Whether the affirmation of a conviction may stand where the Court of Appeals makes findings of fact in sustaining the conviction which are "Clearly erroneous".

Barbara Quattrochi, the main moving focal figure in the portrayed conspiracy pled guilty long prior to this jury trial. Her statements during the course of the "alleged conspiracy" were admitted, over objection. Absent the "hearsay" admission there was clearly no conspiracy.

Bartemio, Brennan and Drain were jointly tried. Bartemio was acquitted of the conspiracy charge, convicted of the "aiding and abetting", albeit, this count had been expressly incorporated into the conspiracy count (App. b, infra). All of the acts or activities chargeable to Bartemio were pleaded in the conspiracy count. None other were proffered.

On Page 3 of the affirming order the Court makes four (4) factual findings in support of the conviction. In sequential order:

a) The first five (5) digits of his license plate were found on a brown paper bag containing bonds;
b) That his name and telephone number were found in the possession of Drain and Brennan when they were arrested;
c) That Bartemio was observed driving Barbara Quattrochi to the south side to meet her source;
d) Bartemio engaged in diversionary tactics to pre-

vent anyone from following Quattrochi to the O'Hare Inn where the sale of the bonds was to occur.[22]

The factual findings are "clearly erroneous". Government's Exhibit 14 was a folded up bag, *empty,* found on the back seat or floor of the automobile which contained Brennan, Drain and several of the bearer bonds. This bag had written "white Ford" followed by the numbers "1W202".[23]

Post-arrest, a piece of paper was taken from *Brennan* which had a telephone number and an address and the names Barbara, Bill Berman, Bud Bartemio.[24] These, Government's Exhibit 17(b) was taken from Brennan only and contained three (3) names, an address and phone number. Both the address and phone number corresponded to Bill Berman and his daughter, Barbara Quattrochi.[25]

As may simply be observed the first two findings dehor the trial record. Facts "c" and "d" are found in the conspiracy count as overt acts "c" and "e" (App. A).

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[22] Appendix pg. 3, infra.

[23] Bartemio was driving a black and white Ford with *Florida* license plates the first digits identical to "1W202". (Gov. Exh. 14).

[24] The phone number and address corresponded to that of Barbara Quattrochi and her father, Bill Berman (Gov. Exh. 17(b).

[25] Quattrochi, Brennan and Drain were arrested for this offense on August 27, 1971; Bill Berman and a man named Gallo were arrested the same night at the address found in Government Exhibit 17(b). 348 E. North Avenue, Northlake, Illinois. *Bartemio* was arrested post-indictment (Feb., 1972) at his home in Florida although he remained in the Chicago area until several weeks after August 27, 1971 (Tr. 668, 669).

As to the erroneous factual findings "a" and "b" they lend no support to an aiding and abetting conviction. The Seventh Circuit in *U.S.* v. *Varelli*, 407 F.2 d 735 (7th Cir., 1969) while reversing both conspiracy and aiding and abetting convictions quoted:

> "Judge Learned Hand in United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938), said that the crime of aiding and abetting requires that defendant "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." (407 F.2d at 749)

Notwithstanding the factual errors the legal innuendos dehor the law. To aid and abet one must in some way associate HIMSELF (emphasis ours) with a criminal venture, *Peoni*, ante. What someone else may have scribbled on scraps of paper or empty bags can in nowise suggest that Bartemio associated HIMSELF with a criminal venture. The legal theory is wrong as applied by the Court of Appeals in this case.

The other findings of fact, "c" and "d", ante, lend no support to aiding and abetting. They were proffered both by indictment and argument as evidence of the conspiracy (Tr. 750, 751, 821).

Speaking to the question of conspiracy viz-a-viz aiding and abetting, the Seventh Circuit Court of Appeals in reversing a conviction based on alleged prohibited acts done after a party leaves Government service (18 U.S.C. 207(a) stated:

> "(1) Where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime" (the Wharton rule); and (2) "where the definition of the substantive of-

> fense excludes from punishment for conspiracy one who voluntarily participates in another's crime." Pinkerton v. United States, 328 U.S. 640, 643, 66 S.Ct. 1180, 1182, 90 L.Ed. 818 (1946).
>
> The Wharton rule operates to prevent conviction both of conspiracy and the substantive offense where the substantive offense could not have been committed without concerted action, so that the conspiracy is really identical with or included within the substantive offense." (476 F.2d at 1119) *U.S.* v. *Nasser*, ante.

"This language makes easy application to the case at bar. Not only is there absent a syllable of suggestion that in this CASE there was no substantive offense absent the conspiracy, but the simple language of the indictment incorporated the substantive offense into the conspiracy count (App. B, infra).

In *U.S.* v. *Hunter, et al.*, 478 F.2d 1019 (7th Cir., 1973) this court reversed certain conspiracy gambling convictions while affirming the substantive offenses finding:

> "If a substantive offense may be committed by a single individual, a conspiracy to commit that offense, unlike an attempt, does not merge with the completed offense. This rule, which stems from the common law distinction between felonies and misdemeanors, is supported by the notion that conspiracy is an especially grave offense and is consistent with the constitutional objection to double jeopardy.

It is respectfully urged that the supervisory power of Supreme Court Rule 19(1)(b) is applicable to the present case. The order affirming the conviction contains not only errors of law but errors of fact which may not yet remain, uncorrected. Only by granting a writ of certiorari may the order affirming this conviction be reviewed.

CONCLUSION

For the foregoing reasons the petitioner respectfully prays this court issue its writ of certiorari to the United States Court of Appeals for the Seventh Circuit and grant review on the issues submitted to this court.

Respectfully submitted,

THOMAS P. DURKIN
ACKERMAN, DURKIN & EGAN
Attorneys for Petitioners

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Chicago, Illinois 60604
May 30, 1974
(Argued November 28, 1973)
Before

Hon. TOM C. CLARK, Associate Justice*
Hon. ROBERT A. GRANT, Senior District Judge**
Hon. JAMES E. NOLAND, District Judge***

UNITED STATES OF AMERICA,

73-1611 Plaintiff-Appellee,
No. 73-1612 vs.
73-1613

ANGELO BARTEMIO, JOHN JOSEPH BRENNAN, and ROGER DRAIN,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 72 CR 397
Philip W. Tone, Judge

(*) Associate Justice Tom C. Clark of the Supreme Court of the United States (Retired) is sitting by designation.

(**) Senior District Judge Robert A. Grant of the United States District Court for the Northern District of Indiana is sitting by designation.

(***) District Judge James E. Noland of the United States District Court for the Southern District of Indiana is sitting by designation.

ORDER

The defendants, John Joseph Brennan and Roger Drain, were charged with possession of approximately one hundred and eighty-nine (189) Oklahoma City Housing Authority Bonds, stolen from an interstate shipment, knowing them to be stolen, in violation of 18 U.S.C. § 659 (Count II). In the same substantive count, Defendant Angelo Bartemio was charged with aiding and abetting that possession. All defendants were also charged with conspiracy (Count I). The jury found defendants Brennan and Drain guilty of conspiracy and the substantive offense of possession. As to Defendant Bartemio, however, the jury acquitted him on the conspiracy count, but returned a verdict of guilty on the aiding and abetting count. All three defendants received prison sentences and have now instituted this appeal. We affirm.

The essential issues which have been presented for consideration in this appeal are as follows: (1) Whether the evidence was sufficient as a matter of law to prove defendants' guilt beyond a reasonable doubt; (2) whether the possession of stolen municipal bonds is within the scope of 18 U.S.C. §659, and whether knowledge that the securities were stolen from interstate commerce is an essential element of a conspiracy to violate 18 U.S.C. § 659; (3) whether the two-count indictment charging Defendant Bartemio with aiding and abetting a violation of 18 U.S.C. § 659 and conspiracy under 18 U.S.C. § 371 was invalid as a matter of law as being duplicitous or multiplicitous, and whether the jury's verdict of acquittal on the conspiracy count renders the conviction of Bartemio void on the substantive count; and (4) whether the prosecutor's closing argument prejudiced defendants, denied them a fair trial, or violated Defendant Brennan's Fifth Amendment right not to testify.

— I —

The appellants assert, first of all, that the evidence upon which they were convicted was so circumstantial in nature that it was insufficient as a matter of law to support the charges of conspiracy, possession, and aiding and abetting. In particular, Appellant Bartemio argues that since the sole evidence against him as to aiding and abetting was highly circumstantial, his mere association with the other defendants was insufficient to convict him. Appellants Brennan and Drain, in turn, maintain that their status as passenger and driver, respectively, of the car in which the securities were found and their mere association with the securities is not sufficient to permit an inference that they were in possession of the bonds or that they had the requisite knowledge that the bonds were stolen. They argue, in effect, that the mere possession of stolen bonds is neither a violation of § 659 nor of any other federal statute.

We agree with Appellants Brennan and Drain that the fact that one is a mere passenger or driver of a vehicle in which there exists stolen goods does not, in itself, necessarily demonstrate possession of the goods or knowledge that the goods therein are stolen. *United States* v. *Nitti*, 444 F.2d 1056, 1059 (7th Cir. 1971); *Pearson* v. *United States*, 192 F.2d 681, 693 (6th Cir. 1951). We are also in accord with Appellant Bartemio's argument that one's mere association with a guilty person is not sufficient evidence to sustain a conviction. *United States* v. *O'Brien*, 174 F.2d 341, 345 (7th Cir. 1949). These cases are readily distinguishable from the case at bar, however.

In the present case, the evidence does not support appellant Brennan's contention that he was a "mere passenger", or Appellant Drain's contention that he was "merely a

driver", or Appellant Bartemio's contention that he was "merely associated" with guilty persons. On the contrary, the evidence adduced and all the reasonable inferences flowing therefrom viewed in the light most favorable to the government, in our opinion, not only substantially supports, but is legally sufficient to support the jury's verdict against each of the appellants. See *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). As to Appellants Brennan and Drain, the fact that the bonds were in marked bags and in plain view in the back seat of the car in which they were occupants, along with all the other evidence strongly tending to show their relationship or association with the bonds and other conspirators, is in our view sufficiently established in the record to support their conviction for conspiracy and for knowingly possessing the stolen securities. At the very least, it can be said that these appellants were in constructive possession of the goods; and this, it has been held, will suffice to establish possession under § 659. *United States* v. *Parent*, 484 F.2d 726, 732 (7th Cir. 1973).

Likewise, we are of the opinion that the evidence has amply demonstrated that Appellant Bartemio was a participant in, or associated with, the venture involving the stolen securities. Most notable here is the fact that the first five digits of his license plate were written on one of the brown paper bags containing bonds which was found in the back seat of Appellant Drain's car, and the fact that his name and telephone number were found in the possession of Drain and Brennan when they were arrested. Further, he was observed driving Barbara Quattrochi, the actual seller of the bonds, to the south side of Chicago to meet her source, and engaging in diversionary tactics to prevent anyone from following her (Quattrochi) to the O'Hare Inn where the sale of the bonds was to occur. Such

activity, which is designed to contribute to the success of a criminal venture, has been held to be sufficient to support a finding of the jury that a person has aided and abetted in the commission of the offense. *Nye & Nissen* v. *United States*, 336 U.S. 613, 619 (1949). We are convinced that the evidence sustains a finding that Bartemio's activity in relation to the stolen securities has, in fact, met this test.

Accordingly, appellants' arguments based upon the sufficiency of the evidence and upon their alleged status as mere innocent bystanders must fail as being totally without merit.

— II —

All three appellants continue by arguing that the securities involved herein are without the scope of 18 U.S.C. § 659, and that therefore the conduct charged in the indictment is not proscribed by that statute. Further, it is Appellant Bartemio's contention, with Appellant Brennan joining him, that appellants were required to know that the property in question was stolen from interstate commerce in order for their convictions to stand, and that the trial court erred in failing to instruct the jury to this effect.

This court notes, however, that the possession of stock certificates stolen from interstate commerce is an appropriate subject for prosecution and has, in fact, been successfully prosecuted under § 659 in this Circuit. *United States* v. *Ditata*, 469 F.2d 1270 (7th Cir. 1972). We perceive here no compelling reason to depart from this established practice under the circumstances of the present case. Moreover, we have stated that this court has consistently affirmed conspiracy convictions where knowledge of the interstate element was not part of the trial court's instructions. *United States* v. *Polesti*, 489 F. 2d 822, 824 (7th Cir.

1973). Knowledge of the interstate nature of the theft need not be proven to sustain a conviction under 18 U.S.C. § 659. *United States* v. *Allegretti*, 340 F.2d 243, 247 (7th Cir. 1964).

Therefore, the trial court's instruction to the jury which in substance read that it was not necessary that defendants knew that the property was stolen from an interstate shipment as long as they knew that the property was stolen (Tr. 855) was not reversible error. Accordingly, appellants' contentions in this regard must be rejected.

— III —

Appellant Bartemio next asserts that the indictment is invalid as a matter of law because it suffers from impermissible duplicity or multiplicity. He argues that the trial court erred in failing to dismiss the aiding and abetting count where it was allegedly incorporated by reference into the conspiracy count as "overt acts". In essence, he maintains that such incorporation by reference renders his conviction void.

Duplicity consists of joining in one count of an indictment two or more distinct and separate offenses. *United States* v. *Tanner*, 471 F.2d 128, 138 (7th Cir. 1972). The test as to whether more than one offense is charged is determined by ascertaining whether each count requires proof of an additional fact which the others do not require. *United States* v. *Johnson*, 298 F.Supp. 58, 62 (N.D.Ill. 1969). The instant indictment against Appellant Bartemio consisted of two counts—a conspiracy count and an aiding and abetting count. Each count required proof not common to the other. Therefore, we decline to accept Bartemio's contention that the indictment is duplicitous.

Multiplicity consists of charging the same defendant with the same offense in several different counts. *Gerberding* v. *United States,* 471 F.2d 55, 58 (8th Cir. 1973). Again we allude to the fact that the indictment herein consisted of two counts, each count charging a separate offense. Noting its particular application to the offenses charged against Appellant Bartemio, we refer to our comment in *United States* v. *Krol,* 374 F.2d 776, 778-779 (7th Cir. 1967):

> Aiding and abetting the commission of a substantive offense is a crime different from a conspiracy to commit the same substantive offense. Evidence establishing knowledge of another's criminal activity and an aiding of it does not of itself establish conspiracy.

Under the guidance of this established principle, we find Appellant Bartemio's multiplicity argument in the present appeal meritless.

Reference to our holding in *Krol, supra,* also serves to dispose of Bartemio's contention that his conviction on the aiding and abetting count is void. In *Krol,* we held that the defendant's conviction would stand where he was found not guilty on the conspiracy part of the indictment but guilty of aiding and abetting the substantive offense. Here, as in *Krol,* we find no demonstration of inconsistency in the split verdict rendered against Bartemio in the trial court. Therefore, his conviction must stand.

— IV —

Finally, appellants join in attacking the prosecutor's closing argument, claiming that it prejudiced them and deprived them of a fair trial. First of all, it is urged that the repeated use of the expression "I think" by the government's attorney during his closing remarks to the jury

was a statement of his personal opinion as to the guilt of Bartemio. Second, it is contended that prejudicial error was committed when the government argued that the reason Appellant Bartemio denied being at O'Hare on August 27, 1971, was because the government had produced no witness to state that he was there. Third, it is argued by Appellant Brennan that he was denied a fair trial when the prosecutor in his closing argument referred to certain evidence as being "uncontradicted and uncontested" because it amounted to an unfair comment on his failure to testify during the trial.

As to the use of the words "I think" by government attorney Lord, we agree with Appellant Bartemio that the use of such an expression was not proper. The government, in fact, has even labeled it as "error". The question, however, is whether it prejudiced the defendant to such an extent that a reversal is in order.

We are of the opinion that the use of the above expression by the government attorney was not prejudicial to appellants when viewed in the context of the trial court's immediate curative instructions. The court delineated the function of the prosecutor to the jury at one point during the government's closing argument, and noted that his use of the terms "I think" was merely a "habit" or "pattern of speech" not intended to be an expression of his personal opinion. Moreover, we have made it very clear in this regard that it is hypercritical to view the use of the words, "I know, etc." by a government attorney in his closing argument as testifying on behalf of the prosecution when the prosecutor begins his argument by focusing the jury's attention upon an analysis of the evidence in the case.

United States v. *Klein*, 187 F.2d 873, 876 (7th Cir. 1951). This is precisely the situation we have before us in the case at bar.

We hold, therefore, that in the present case where the court extended repeated admonitions to the prosecutor, and especially where the court gave prompt, cautionary instructions to the jury regarding the prosecutor's choice of language, appellants were not prejudiced or deprived of a fair trial. See *United States* v. *Handman*, 447 F.2d 853, 855 (7th Cir. 1971).

Likewise, we find that the government's reference to certain evidence as being "uncontradicted and uncontested" could not have naturally and necessarily been taken by the jury as a comment upon Appellant Brennan's right not to testify. *United States* v. *Lyon*, 397 F.2d 505, 509 (7th Cir. 1968). This opinion is supported where Brennan was not the only person who could have challenged or contradicted such evidence. Indeed, any of the other participants could have rebutted such evidence. *Handman, supra*, 447 F.2d at 855. Additionally, the government's argument was not unfair or prejudicial since it dealt solely with evidence in the record and not with Brennan's failure to testify. *United States* v. *Aldridge*, 484 F.2d 655, 659-660 (7th Cir. 1973).

Finally, we conclude that the government's comment on Appellant Bartemio's denial of his being at O'Hare on August 27 is not reversible error since it was intended to be a comment on his credibility based on the facts of the case. A prosecutor is allowed to comment on the credibility of a defendant who takes the witness stand. *United States* v. *Jansen*, 475 F.2d 312, 317 (7th Cir. 1973).

Accordingly, the judgments of conviction as to each of these appellants in the district court are hereby AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
June 28, 1974.

Before
Hon. TOM C. CLARK, Associate Justice
Hon. ROBERT A. GRANT, Sr. Judge
Hon. JAMES E. NOLAND, District Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 73-1611, 73-1612 vs.

ANGELO BARTEMIO, JOHN JOSEPH BRENNAN,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Divsn.
(72 CR 397)

On consideration of the petition for rehearing and suggestion that it be reheard *en banc* filed in the above-entitled cause, no Judge in active service having requested a vote thereon, nor any Judge having voted to grant the suggestion, and all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for a rehearing in the above-entitled cause be, and the same is hereby, DENIED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA

vs.

BARBARA QUATTROCHI, ANGELO BARTEMIO, JOHN JOSEPH BRENNAN and ROGER DRAIN

No. 72 CR 397
VIO. Title 18, United States Code, Sections 659 and 371

The SPECIAL FEBRUARY 1971 GRAND JURY charges:

That from on or about June 1, 1971, to on or about August 27, 1971, in the Northern District of Illinois, Eastern Division, and elsewhere,

BARBARA QUATTROCHI
ANGELO BARTEMIO
JOHN JOSEPH BRENNAN and
ROGER DRAIN,

defendants herein, did knowingly and unlawfully conspire, combine and confederate and agree together and with diverse other persons to the Grand Jury unknown, to commit an offense against the United States; that is, to possess approximately one hundred and eighty-nine (189) Oklahoma City housing Authority Bonds, which had been stolen and unlawfully carried away from Flying Mail Man Service, Inc., while moving in interstate commerce from Chicago, Illinois, to New York City, New York; in violation of Title 18, United States Code, Section 659.

It was a part of the conspiracy that BARBARA QUATTROCHI and ANGELO BARTEMIO would procure stolen Oklahoma City Housing Authority bonds for resale to third parties;

It was a further part of the conspiracy that BARBARA QUATTROCHI would contact individuals and negotiate the sale of the bonds;

It was a further part of the conspiracy that BARBARA QUATTROCHI would act as a courier to transport a portion of the bonds to prospective buyers as a sample;

It was a further part of the conspiracy that JOHN JOSEPH BRENNAN and ROGER DRAIN would act as couriers to transport a portion of the bonds to a location where the bonds were to be sold;

All of the acts of which of the defendants described in Count Two of this indictment, the allegations of which Count are hereby incorporated by reference, are designated as overt acts done in furtherance of and to effect the object of the conspiracy; and, in addition thereto and in furtherance of the conspiracy, the defendants did commit the following overt acts:

(a) BARBARA QUATTROCHI had a conversation with Leroy Dal Porto in Stone Park, Illinois, on or about July 31, 1971;

(b) BARBARA QUATTROCHI had a conversation with Leroy Dal Porto on August 5, 1971 by telephone, in the Northern District of Illinois;

(c) BARBARA QUATTROCHI and ANGELO BARTEMIO drove an automobile from 348 East North Avenue, Northlake, Illinois, to the south side of Chicago on August 9, 1971;

(d) BARBARA QUATTROCHI gave Leroy Dal Porto two Oklahoma City Municipal Bonds at the O'Hare Inn, Chicago, on or about August 27, 1971;

(e) ANGELO BARTEMIO drove an automobile from the residence at 348 East North Avenue, Northlake, Illinois, on or about August 27, 1971;

(f) BARBARA QUATTROCHI gave Leroy Dal Porto one hundred and ten (110) Oklahoma City Housing Authority Bonds at the O'Hare Inn, Chicago, Illinois, on or about August 27, 1971;

(g) JOHN BRENNAN and ROGER DRAIN transported seventy-nine (79) Oklahoma City Housing Authority Bonds in an automobile to the parking lot of the O'Hare Inn, Chicago, Illinois, on or about August 27, 1971;

(h) JOHN BRENNAN walked from an automobile in the parking lot of the O'Hare Inn, in Chicago, to the lobby of the O'Hare Inn, Chicago, on or about August 27, 1971;

In violation of Title 18, United States Code, Section 371.

COUNT II

The SPECIAL FEBRUARY 1971 GRAND JURY further charges:

On or about the 27th day of August, 1971, in the Northern District of Illinois, Eastern Division,

BARBARA QUATTROCHI
JOHN JOSEPH BRENNAN and
ROGER DRAIN,

defendants herein, unlawfully, wilfully and knowingly did have in their possession, goods and chattels of a value in excess of $100.00; that is, one hundred and eighty-nine (189) $5,000.00 denomination Oklahoma City Housing Au-

thority Bonds which had been embezzled, stolen and unlawfully taken and carried away from Flying Mail Man Service, Inc., while moving in interstate commerce from Chicago, Illinois to New York City, New York, and that said defendants then and there knew that the chattels had been stolen; and

ANGELO BARTEMIO

defendant herein, did aid and abet the commission of the aforementioned offense by BARBARA QUATTROCHI, JOHN JOSEPH BRENNAN and ROGER DRAIN;

In violation of Title 18, United States Code, Section 659.

A TRUE BILL:

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FOREMAN

.....

UNITED STATES ATTORNEY

TDM:slg

APPENDIX C

SUPPLEMENTAL INSTRUCTION IN RESPONSE TO JURY'S NOTE #3
(Filed May 1, 1973)

What the jury refers to in its note as "Barbara's statement" is not in evidence except for the limited purpose of providing a sample of her handwriting, for use by the handwriting expert in his examination of another document.

The so-called statement is not addressed to the matters in issue in this case. It is just a sample of her handwriting and was admitted solely for that purpose. (*Handwritten*)

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2068

ANGELO BARTEMIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that (1) the prosecutor withheld exculpatory evidence; (2) the prosecutor made an improper closing argument; (3) the indictment was duplicitous; (4) he should not have been convicted for aiding and abetting the possession of stolen bonds, since the theft occurred before his involvement in the case; and (5) the court of appeals made clearly erroneous findings of fact in affirming his conviction.

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was found guilty of aiding and abetting in the possession of bonds stolen from an interstate shipment, knowing them to be stolen, in violation of 18 U.S.C. 659 and 2. He was sentenced to a term of five years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App. A).

The evidence showed that petitioner was engaged in aiding and abetting co-defendants Brennan, Drain and Barbara Quattrochi[1] in the possession and disposal of one hundred and eighty-nine stolen Oklahoma City Housing Authority Bonds. Petitioner's involvement in the unlawful possession was shown by the fact that the first five digits of his license plate number were written on a brown paper bag containing stolen bonds found in the rear of Drain's car; that his name and telephone number were found on both Drain and Brennan when they were arrested; and that "he was observed driving Barbara Quattrochi, the actual seller of the bonds, to the south side of Chicago to meet her source, and engaging in diversionary tactics to prevent anyone from following her (Quattrochi) to the O'Hare Inn where the sale of the bonds was to occur" (Pet. App. A4).

1. Petitioner contends that the prosecutor, in violation of *Brady* v. *Maryland*, 373 U.S. 83, suppressed a fifteen page statement given by Barbara Quattrochi to the probation office, which formed part of her pre-sentence investigation report and which contained exculpatory material. Three pages of this statement were introduced at petitioner's trial as a handwriting exemplar (Govt. Ex. 13) to prove that Quattrochi had written certain notations on a piece of paper found on her person at the time of her arrest.[2] Petitioner concedes that these three pages were

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[1]Petitioner and his co-defendants were charged in a two-count indictment (Pet. App. A). Count One charged each of the defendants with conspiracy. Count Two charged Brennan, Drain and Quattrochi with possession of stolen securities and petitioner with aiding and abetting in that possession. Petitioner was acquitted on the conspiracy count; Brennan and Drain were convicted on both counts; Barbara Quattrochi entered a plea of guilty to both counts prior to trial.

[2]These notations (Govt. Ex. 8) indicated that petitioner was to receive a portion of the abortive sale of bonds. Barbara Quattrochi did not testify at petitioner's trial.

provided to defense counsel prior to trial, but contends that "the balance of this statement * * * was never tendered or showed to defense counsel" until after the court of appeals affirmed petitioner's conviction (Pet. 5). In his petition for rehearing filed with the court of appeals, petitioner alleged for the first time that the government had unlawfully withheld the Quattrochi statement.

The United States Attorney, in his response, denied that the balance of the Quattrochi statement, which was not turned over to the accused, contained evidence which was in any way favorable to him. Petitioner's contention that Quattrochi's statement contained exculpatory material is now pending before the district court, by motion of petitioner pursuant to 28 U.S.C. 2255. Since the district court is the proper forum for the resolution of this question, it would be inappropriate for this Court to consider this factual issue prior to a determination by that court.

2. Petitioner contends that the prosecutor's closing argument was prejudicial and that it denied him a fair trial. This contention is based on the use of the phrase "I think" several times by the prosecutor during the course of his closing argument. On several occasions petitioner's counsel objected to the use of the phrase and in each instance the trial court instructed the jury that "what the prosecutor says is not to be taken as his personal opinion" (Tr. 754, 755, 756, 758). The trial court also instructed that the prosecutor's function was limited to "arguing the legitimate inferences from the evidence" (Tr. 754, 755, 756), and that his use of the term "I think" was "his habit of speech," and not intended to be an expression of personal opinion (Tr. 754, 755, 756, 759). The prosecutor acknowledged the correctness of the court's instructions by repeatedly apologizing for his verbal slips (Tr. 755, 756, 758). In reviewing these incidents the court of appeals

correctly found "that the use of the above expression by the government attorney was not prejudicial to appellants when viewed in the context of the trial court's immediate curative instructions" (Pet. App. A 8).

Any error with regard to the prosecutor's comments was therefore harmless in these circumstances. *Chapman* v. California, 386 U.S. 18, 22-24; *Harrington* v. *California*, 395 U.S. 250. See also, *Donnelly* v. *DeChristoforo*, No. 72-1570, decided May 13, 1974.

3. Petitioner raises a series of contentions relating to the indictment (Pet. App. B) under which he was charged. He claims that it is duplicitous and multiplicitous. He also contends that his acquittal on the conspiracy count should void his conviction on the aiding and abetting count since the latter offense is allegedly incorporated by reference into the conspiracy count as "overt acts."

As the court of appeals noted (Pet. App. A 6), duplicity consists of joining in one count of an indictment two or more distinct and separate offenses. *United States* v. *Tanner*, 471 F. 2d 128, 138 (C.A. 7). The instant indictment against petitioner consisted, however, of two counts—a conspiracy count and an aiding and abetting count. The court stated, "[e]ach count required proof not common to the other." The indictment was therefore not duplicitous.

Multiplicity consists of charging the same defendant with the same offense in several different counts. *Gerberding* v. *United States*, 471 F. 2d 55, 58 (C.A. 8). Aiding and abetting the commission of a substantive offense, however, is a crime different from a conspiracy to commit the same substantive offense. Evidence establishing knowledge of another's criminal activity and an aiding of it does not itself establish conspiracy. *United States* v. *Krol*, 374 F. 2d 776, 778-779 (C.A. 7). It was not inconsistent,

therefore, that petitioner should have been acquitted on the conspiracy count yet convicted of the aiding and abetting count.

4. Petitioner contends that he could not be charged as an aider and abettor because the bonds were stolen prior to his involvement in the case. In support of his position petitioner relies upon this Court's decision in *Bollenbach* v. *United States*, 326 U.S. 607. *Bollenbach*, however, is inapposite. Bollenbach was charged with aiding and abetting the transportation of stolen securities in interstate commerce. The facts established that his only involvement was trying to find a buyer for the securities long after they had been transported. This Court, held, therefore, that while Bollenbach could have successfully been charged as an accessory after the fact, he could not be convicted of aiding and abetting the already accomplished transportation. 326 U.S. at 610-11. In contrast, petitioner here was charged with aiding and abetting in the *possession* of stolen goods and not the earlier theft of those goods. The evidence therefore fully supported his conviction.

5. Finally, petitioner contends that his conviction is infirm because the court of appeals assumed certain findings of fact which he argues are clearly erroneous. Petitioner contends that the paperbag on which the first five numbers of his license were written did not contain the bonds, as indicated by the court of appeals, but was rather found empty in his co-defendant's car. Evidence at trial disclosed, however, that the brown bag with petitioner's license number (Govt. Ex. 14) was identical to the bag (Govt. Ex. 15) in which the balance of the stolen bonds were found. He next claims that the notation on the bag indicated that he had a white Ford, when in truth his car is black and white. And, finally, he asserts that only Brennan was found in possession of his address and phone

number, rather than each of his co-defendants. Even assuming, *arguendo*, the accuracy of each of these assertions, the jury could still infer petitioner's participation as an aider and abettor in the possession of stolen bonds. See *Glasser* v. *United States*, 315 U.S. 60, 80.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1974.

DOJ-1974-10